No. 92-94

In The

Supreme Court of the United States

October Term, 1992

LARRY ZOBREST, SANDRA ZOBREST, husband and wife; JAMES ZOBREST, a minor, by LARRY and SANDRA ZOBREST, his parents,

Petitioners,

v.

CATALINA FOOTHILLS SCHOOL DISTRICT,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Petitioner, James Zobrest, a boy profoundly deaf from birth, complied with the compulsory education laws of Arizona by attendance at the religious school of his parents' conscientious choice. Since James required the services of a certified sign language interpreter in order to receive education, petitioner parents applied to respondent public school district for the providing of such services under the terms of the Education of the Handicapped Act (EHA)*, an act for aid to the education of all children with disabilities. Respondent found James fully qualified under those terms to receive such services but declined, solely on Establishment Clause grounds, to furnish them on the premises of his school. The following question is presented:

> Does the Establishment Clause bar a local educational agency from providing, under the EHA, the service of a certified sign language interpreter to a deaf child on the premises of his religious school or from reimbursing his parents for the cost thereof?

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* 20 U.S.C. §1400, *et seq.* (and its state counterpart, Ariz. Rev. Stats. §§15-761, *et seq.*). The title of the federal act was changed in 1991 to Individuals With Disabilities Education Act ("IDEA") and, throughout the text, the terms "disabled," or "with disabilities," substituted for "handicapped." Since all documents in the record use the former "EHA" terminology, petitioners have retained that in this brief.

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The opinion of the United States Court of Appeals for the Ninth Circuit, which appears as Appendix A in the petition for certiorari, is reported in 963 F.2d 1190 (9th Cir. 1992). The dissenting opinion in that court, which appears as Appendix B in the petition for certiorari is reported in 963 F.2d at 1197 (9th Cir. 1992). The order and judgment of the United States District Court for the District of Arizona, which appears as Appendix C in the petition for certiorari is reported in 441 EHLR 564 (D. Ariz. 1989) and is otherwise unreported.

JURISDICTION

This case was decided and judgment was entered by the United States Court of Appeals for the Ninth Circuit on May 1, 1992. The petition for a writ of certiorari was filed on July 10, 1992, and was granted on October 5, 1992. The jurisdiction of this court was invoked under Title 28 of the United States Code §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment I:

> "Congress shall make no law respecting an establishment of religion . . . "

Education of the Handicapped Act:

> 20 United States Code, §§1400, 1401, 1412, 1413, 1414(a), 1415, reprinted at A-37 - A-65.* (No changes relevant to this case appear in the Individuals With Disabilities Education Act amending EHA.)

Code of Federal Regulations:

> 34 C.F.R. §§76.532(a)(1), 76-651, 76-652 to 76-660; 300.1 to 300.14, 300.110 to 300.132, 300.304, 300.340 to 300.348, 300.401 to 300.403, 300.450 to 300.452, reprinted at A-67 - A-105.

Special Education For Exceptional Children Act:

> Arizona Revised Statutes, Art. 4, §§15-756, 15-761, 15-764 to 15-769, reprinted at A-105 A-127.

STATEMENT OF THE CASE

Statement of Facts

In October, 1987 petitioners Larry and Sandra Zobrest requested respondent public school district (hereinafter "School District") to provide the service of a certified sign language interpreter for their son, the petitioner James Zobrest, a profoundly deaf boy then 14 years old. Petitioners' application was made pursuant to the provisions of the Education of the Handicapped Act (EHA), 20 U.S.C. §1400, *et seq.*, and its Arizona statutory counterpart, Ariz. Rev. Stats. §§15-761, *et seq.* The parents notified

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* The signal "A" refers to the Appendix to the Petition For Certiorari. The signal "J.A." refers to the Joint Appendix.

the School District that they had enrolled James at Salpointe Catholic High School for the school year commencing August 17, 1988 (J.A. 93-94), and that he would need the EHA service to be furnished on the premises of that school.[1] The School District found James to be a "handicapped person" within the meaning of the EHA. (J.A. 88). It was agreed by the School District that sign language interpretation is one of the "special education and related services" to which James was entitled. (A-5, n. 1, J.A. 88-89). The School District then pursued EHA procedures for evaluating James' needs and issued an Individualized Education Program (IEP) for him on September 21, 1988. The IEP specified: "All parties agree that Jim Zobrest needs the services of a sign language interpreter." (A-128 - A-134, J.A. 88).

James' enrollment at Salpointe Catholic High School was based upon the mandate of the religious conscience of his parents, in keeping with the views of their church. They felt it essential that, at the time of adolescence, James be enrolled in a religious school. (Zobrest affidavit, J.A. 63-64). Salpointe is a pervasively religious school (J.A. 90-92), in which daily worship is held and encouraged and religious values are emphasized. (A-5). At Salpointe James fulfilled the requirements of the Arizona compulsory school attendance law. (J.A. 87). Salpointe is

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[1] At the junior high school level the respondent school district had furnished him, on public school premises, a mainstream program with resource room assistance for academics, speech/language therapy, and an interpreter for all classes. (A-128).

approved by the Department of Education, State of Arizona, and is accredited as a College Preparatory School by North Central Association of Colleges and Schools. The basic curriculum for graduation consists of English, Social Science, Mathematics, Science, Foreign Language, Religion and five to nine hours per year of electives. (J.A. 81-85). Salpointe's graduates have long been accepted in scores of nonsectarian colleges and universities throughout the nation.[2]

A certified sign language interpreter is an individual certified by the Registry of Interpreters For the Deaf and, as such, is bound by the Registry's Code of Ethics.[3] The Code defines "interpret" as:

> Spoken English to American Sign Language (ASL); American Sign Language to Spoken English.

(J.A. 70). The Code states further:

> Interpreter(s) . . . are not editors and must transmit everything that is said in exactly the same way it was intended . . . Interpreter(s) . . . must remember that they are not at all responsible for what is said, only for conveying it accurately. If the interpreter's . . . own feelings interfere with rendering the message accurately, he/she shall withdraw from the situation.

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[2] Salpointe Catholic High School Annual Report, 1986-1987, 22-23, Exhibit C to Defendant's Second Request For Admissions and Non-uniform Interrogatories, admitted into evidence by order of the District Court filed April 13, 1989.

[3] A copy of the relevant portion of the Code is attached to the affidavit of intepreter James Santeford. (J.A. 77-80).

(J.A. 73).

> Just as interpreter(s) . . . may not omit anything which is said, they may not add anything to the situation, even when they are asked to do so by other parties involved . . . The interpreter's only function is to facilitate communication. He/she shall not become personally involved because in so doing he/she accepts some responsibility for the outcome, which does not rightly belong to the interpreter . . .

(J.A. 74).

Thus in performing his or her function, the sign language interpreter is the conveyor of communications to and from the deaf student, so that the latter's educational experience is sought to be identical to that of the hearing student.

James' parents, by affidavit, stated that the cost to them (in addition to $2,000. annual tuition and expenses) of hiring a certified sign language interpreter would be somewhat over seven thousand ($7,000.) dollars per year. (J.A. 65). The School District stipulated that, had his parents forsaken their choice of a religious school for James, he "would be afforded, without cost to his parents, and at the full expense of Catalina Foothills School District, the services of a sign language interpreter." (J.A. 88-89).

On June 27, 1988, the Arizona Attorney General issued an opinion that the Establishment Clause barred the furnishing, on the premises of Salpointe, sign language interpreter services for James (J.A. 9) and the

School District accordingly declined to do so.[4] On May 16, 1992, James was graduated from Salpointe.

The Course of Proceedings

On August 1, 1988, petitioners brought this action in the United States District Court for the District of Arizona, alleging economic hardship (J.A. 21, 66-67) and claiming that respondent's denial of the requested services of a certified sign language interpreter violated the EHA and petitioners' free exercise rights. The complaint, pursuant to 20 U.S.C. §1415(e), 28 U.S.C. §2202, and Rule 65 of the Federal Rules of Civil Procedure, sought an injunction requiring the providing of the services and, alternatively, "such other and further relief as the Court may deem just and proper." (J.A. 25).

Before the District Court it was the position of the School District that it was empowered by EHA to furnish the sign language interpreter service to James on the premises of any public school or of any secular private, "non-parochial" school. (J.A. 34, 35, 37).[5]

The District Court on July 18, 1989, granted respondent's cross-motion for summary judgment and, relying upon *Aguilar v. Felton*, 473 U.S. 402 (1985) and *School*

[4] The respondent continued James in its special education system, providing, pursuant to the EHA, speech therapy services twice weekly to him on public school premises, transportation related thereto, and continuing annually to update his IEP. (J.A. 88, A-128 - A-131).

[5] The School District has continued to maintain this position throughout this litigation. A-5; Brief In Opposition To Petition For Writ of Certiorari, 3.

District of Grand Rapids v. Ball, 473 U.S. 373 (1985), held that the furnishing of the requested services to James would violate the Establishment Clause by creating "entanglement of church and state that is not allowed." *Zobrest v. Catalina Foothills School District*, 441 EHLR 564 (1989).[6]

On August 4, 1989, respondents filed a Notice of Appeal with the United States Court of Appeals for the Ninth Circuit, challenging the District Court's ruling under the Establishment Clause and asserting free exercise and equal protection grounds for reversal. On May 1, 1992, a divided Court of Appeals, affirming the judgment of the District Court, held that to provide the requested EHA service on the premises of James' religious school would have a primary effect advancing religion by creating a "symbolic union" of church and state (A-10) and by constituting public aid to a sectarian institution. (A-11 – A-12). Further, it would create excessive entanglements between government and religion. (A-13). On July 10, 1992, petitioners filed a Petition For Certiorari in the Supreme Court, and that petition was granted October 5, 1992.[7]

[6] The Attorney General had stated that it would be futile for petitioners to exhaust administrative remedies under EHA (A-135), and the parties thereafter so stipulated. (J.A. 94).

[7] Petitioners, both under the prayer of their complaint for relief alternative to injunction and by virtue of 20 U.S.C. §1415(e)(2), are now seeking reimbursement of the expense they have incurred in paying for the services of a certified sign language interpreter for James for the school years August, 1988, through May, 1992, when he was graduated.

SUMMARY OF ARGUMENT

The Court of Appeals, holding that the petitioner James Zobrest was eligible, under the EHA, to receive the service of a certified sign language interpreter, erred in holding that the furnishing of that service on the premises of James' religious school would have a primary effect advancing religion. The requested interpreter's service would have multiple effects, the primary effect being the advancing of the general education of a citizen. The furnishing of that service on the premises of James' school would create no symbolic union of church and state and would suggest no governmental sponsorship of religion. Prior decisions of the Supreme Court in the *Mueller, Witters* and *Allen* cases sustain the constitutionality of affording the EHA service sought by petitioners, while decisions of this Court in the *Lemon, Meek, Wolman, Grand Rapids* and *Aguilar* cases are not precedents to the contrary. No excessive entanglements between government and religion would arise from the providing of the required EHA service. The primary effect of denial of the service is the inhibiting of religion.

ARGUMENT

THE ESTABLISHMENT CLAUSE DOES NOT BAR A LOCAL EDUCATIONAL AGENCY FROM PROVIDING, UNDER THE EHA, THE SERVICE OF A CERTIFIED SIGN LANGUAGE INTERPRETER TO A DEAF CHILD ON THE PREMISES OF THE CHILD'S RELIGIOUS SCHOOL

The Court of Appeals agreed with all parties that James Zobrest was statutorily qualified to receive the

EHA service which he and his parents had requested. (A-4 - A-5, J.A. 88-89). The court, however, held that the furnishing of that service would have a primary effect advancing religion and hence constitute a violation of the Establishment Clause. (A-9 - A-10). This "primary effect," the court said, would arise from the School District's placing of the interpreter on Salpointe's premises to be at James' side in all of his school functions since that would (a) create a "symbolic union" of church and state (A-10), (b) constitute public aid to a sectarian institution (A-11 - A-12), and create excessive government-religion entanglements. (A-13).

A. The Primary Effect of Providing the Service Would be to Advance the General Education of a Citizen

The determination of the Court of Appeals that furnishing sign language interpreter service to James would have a primary effect advancing religion rests upon a misconception of the term "primary." Particular governmental actions may have multiple effects. The court's view appears to be that if the provision of a service has *any* religious effect, then the primary effect of the service is religious. But if the word "primary" is to have any meaning, one out of many effects of particular governmental action may not automatically be held "primary" simply because it is religious. The present case serves to illustrate that point.

At Salpointe, James, through the interpreter, received religious education and engaged in religious practice. He also received an education largely indistinguishable, from

a secular viewpoint, from that of any other Arizona boy meeting state compulsory attendance requirements in a school approved by the Arizona Department of Education and accredited by the North Central Association of Colleges and Schools. (See J.A. 87, 81-85). The fact that Salpointe is a pervasively religious institution does not alter the fact that, through the interpreter at Salpointe, James worked the same equations in algebra, the same theorems in geometry and the same conjugations in German that all students in secular schools work.

The School District stresses, however, that James' parents chose Salpointe because they wanted him educated at a Catholic school. This is indeed true. (J.A. 89). That was their personal *religious* reason. But that is no more relevant to the question of whether the religious effect of his education at Salpointe was the primary effect of the interpreter's service than was his parents' *educational* reason. They, like all responsible parents, desired to secure for their child a foundation in the common branches of learning in order that James might become independent, survive in the world, qualify for the business of life, obtain employment to sustain himself, and, conceivably, go on to college. The service of the interpreter for James at Salpointe produced *multiple* effects, most of these being identical to the secular effects produced in public schools and undeniably constituting, quantitatively, the predominant educational effect. The Zobrest parents did not send their son to Salpointe to become a religious zombie. Especially because he is severely handicapped, they wanted him to get what the state regards as proper education (J.A. 87 and see A.R.S. §15-802) and, in accordance with an important objective

of EHA (§1412(5)), to get it in a common environment with non-handicapped children. The primary effect of the interpreter service was *the advancing of a disabled boy's education as a citizen in a way consonant with the civil right of freedom of conscience.*

B. No "Symbolic Union" of Government and Religion Would be Created by Furnishing the Requested Service

Both the Court of Appeals and the respondent School District rely on *School District of Grand Rapids v. Ball,* 473 U.S. 373 (1985), for their conclusion that the District's providing a sign language interpreter to James would create a "symbolic union" between church and state. (A-9; Br. Opp.* 7-8.) This conclusion is plainly erroneous. The facts of *Grand Rapids* and the facts of the present case do not remotely match up. *Grand Rapids* involved two educational programs taught by public school teachers, financed by public school districts, and carried out on the premises of religious schools. One of the programs covered instruction in a range of courses (reading, art, music, etc.) supplementary to the core curriculum. The other offered a group of courses (Arts and Crafts, Home Economics, etc.) for both children and adults. The public school system leased the classroom space from the religious schools, and signs were posted giving notice to the public that the spaces were so leased. This Court held the programs to create a "symbolic union of government and

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* "Br. Opp." refers to Brief in Opposition to Petition For Writ of Certiorari.

religion in one sectarian enterprise" (*Grand Rapids, supra,* at 392), and thus to violate the Establishment Clause. Since *symbolism* (or image) was a matter of decisive consideration to the Court of Appeals in the present case, it is obvious that the *Grand Rapids* programs, with their large scale, their leases and the signs relating to them, the breadth of their educational project taking place in 40 sectarian schools, and the continual movement of students in the programs between religious school and public school classes, necessarily engendered a symbol radically different from any symbol which might be said to be generated by a certified sign language interpreter's assisting James at Salpointe.

While the "symbolism" spoken of by the Court in *Grand Rapids* was one "likely to influence children of tender years" (*id.* at 390), the court below moved from fact to fiction when it ventured that, by providing the interpreter, "the government would create the appearance that it was a 'joint sponsor' of the school's activities." (A-10). That is to say, James' schoolmates, seeing the District-hired interpreter signing to James and speaking for James, would conclude not only (a) that Salpointe Catholic High School and the Catalina Foothills School District were jointly sponsoring Salpointe's myriad activities (a somewhat remarkable conclusion to ascribe to the mind of the typical teenager), but also (b) that behind the "joint sponsorship" was a matter of dark significance: violation of the Establishment Clause of the First Amendment to the Constitution of the United States. The role of a certified sign language interpreter, furnished under EHA, is devoid of any symbolic character, certainly any constituting a "crucial symbolic link between government

and religion." (*Grand Rapids,* at 385). To the contrary, affording James the service requested, if it presented any image at all to his classmates, might well have been one, highly positive in character, of our American government and democratic ways,in acting with fairness and compassion toward the disabled.

The court and the School District wholly misconceive the function of a certified sign language interpreter. Under the Registry's Code of Ethics to which he is bound he can have no role as teacher, editor or initiator, endorser or critic of ideas. (J.A. 70-74).[8] The certified interpreter's presence in the classroom, unlike that of the teacher, provides no occasion for "'the students' emulation of teachers as role models'." *Board of Education of Westside Community Schools v. Mergens,* 496 U.S. 226, 251 (1990), quoting from *Edwards v. Aguillard,* 482 U.S. 578 (1987). Nor would the School District's providing the interpreter be "symbolic" in the sense that it would send any message of government endorsement or of making

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[8] Like the Title I instructors in *Aguilar v. Felton,* 473 U.S. 402 (1985), the certified sign language interpreter is a professional whose mental capacity to follow ethical rules by which he or she is bound should be assumed and whose honor should not, without more, be questioned. The "common sense" of the matter is that such dedicated professionals will not tend to disobey their ethical instructions merely because they serve in a religious school classroom. (*Aguilar supra,* at 425-427, O'Connor, J., dissenting). And see *Sedalia School District v. Missouri Commission on Human Rights,* Case No. 45447, Mo. Ct. App., W.Dist. (1992) (slip op): a public school district justified in firing a high school sign language interpreter who, in violation of the Code of Ethics, either modified language she found objectionable or informed students that the speaker had used "bad language."

religion relevant to any person's standing in the political community. See *Lynch v. Donnelly*, 465 U.S. 668, 687-688 (1984) (O'Connor, J., concurring); *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 593 (1989). The "symbol" of church-state union posed by the Court of Appeals is illusory, and this Court, distinguishing between "real threat and mere shadow" (see Goldberg, J., concurring in *School District of Abington Township v. Schempp*, 374 U.S. 203, 208), should hold it of no constitutional significance.

The School District departs even farther from the teachings of this Court when it looks to *Lee v. Weisman*, ___ U.S. ___, 112 S.Ct. 2649 (1992) for support. (Br. Opp. 8). The School District says, first, that if it is unconstitutional for government to inject a religious presence into a public school ceremony, then it is unconstitutional for government to inject a sign language interpreter into a religious school classroom. (Br. Opp. 8). The two thoughts simply do not connect. The School District also says that, since public school officials are barred by *Weisman* from sponsoring graduation prayers, they must likewise be barred from placing an interpreter in a religious school where he assists in the communicating of prayers. (*Ibid.*) *Weisman*, however, held only that state sponsorship of prayer by a clergyman at a public school ceremony violates the Establishment Clause because of the subtle coercive pressure for religious conformity which that would exert upon students. *Weisman, supra*, at 2656. *Weisman* thus presents a situation to which the facts of the present case are in no way analogous. In the present case a public institution is not involved, no state-directed, clergy-led prayer activity is involved, and the interpreter's role can

in no sense be said to be one which would pressure any student to conform to anybody's religion.

C. Decisions of this Court on "Primary Effect" Contradict, Rather than Sustain, the Opinion of the Court of Appeals

The Court of Appeals (A-ll – A-13), as additional bases for its holding the aid to James to have a primary effect advancing religion, groups two sets of Supreme Court decisions:

1. *Mueller and Witters.* The opinion below correctly summarizes the substance of *Mueller v. Allen*, 463 U.S. 388 (1983), when it notes that involved there was " 'the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from [a] neutrally available . . . benefit . . . ' " (A-11).[9] The aid to James has no more "primary effect advancing religion" than had the aid to religious school parents in *Mueller*. In *Mueller* the parents' "private choice" consisted in electing to take a state-offered benefit. That is precisely the case with the Zobrests here. It was their election, through their application for help under EHA, which would have triggered the

[9] The record suggests no benefit whatever which would accrue to Salpointe Catholic High School by an interpreter's providing an EHA service to James. It may be noted that Salpointe is not a party in this case and did not seek intervention. Nothing in the record indicates that Salpointe had previously provided sign language interpreter services to students (which financial burden to the school would be lifted by provision to them under EHA).

District's providing the "neutrally available" interpreter. The providing of the service would have been triggered neither by Salpointe (*Salpointe* made no such application) nor by the School District (which was bound by law to provide such a service.) Further, with the EHA here as with the tax deduction in *Mueller*, "the provision of benefits to so broad a spectrum of groups is an important index of secular effect." *Widmar v. Vincent*, 454 U.S. 263, 274 (1981). As Judge Tang well observed in his dissent below (A-20), " . . . [T]he use of the word 'primary' in the [*Lemon*] test connotes a survey of the legislation's total operation, rather than its particular application in the pending case."

In seeking to distinguish the present case from *Witters v. Washington Dept. of Services for the Blind*, 471 U.S. 481 (1986), the Court of Appeals repeats its erroneous assumption that, while in *Witters* the aid resulted from an individual's decision, here it would result from a decision by the State. (A-11). In *Witters* the Supreme Court noted that governmental aid flowed to a religious institution because the blind beneficiary of that aid had chosen to receive it to support his attendance at such an institution. So it is with the deaf individual in the present case. And, as in *Witters*, so here: the EHA service to James "creates no financial incentive for students to undertake sectarian education" (*Witters*, at 488), and "does not tend to provide greater or broader benefits for recipients who apply their aid to religious education . . . " (*Ibid.*) Nor is the EHA program well suited to serve as a "vehicle for subsidy" to religious institutions any more than was the program considered in *Witters*. It should be noted, finally,

that if (as the School District and the court below contend), the religious character of the student's educational institution is determinative of the "primary effect" issue, the institution attended by the student in *Witters* was arguably far more religious. Unlike Salpointe, a religious school affording a general educational program, the Inland Empire School of the Bible, wherein the *Witters* student was "studying bible, ethics, speech, and church administration in order to equip himself for a career as a pastor, missionary, or youth director," was akin to a seminary. (*Id.* at 483).

2. *Allen, Meek and Wolman.* The Court of Appeals, as its final ground for holding that furnishing the EHA service to James would have a primary effect advancing religion, relies on *Board of Education v. Allen*, 392 U.S. 236 (1968), *Meek v. Pittenger*, 421 U.S. 349 (1975) and *Wolman v. Walter*, 433 U.S. 229 (1979). These, the court says, stand for the proposition that aid to sectarian schools is permissible where it has a " 'purely secular content' " but not otherwise. (A-13).

The court's reasoning does not withstand close examination. In the present case the student aid is secular in nature. The certified interpreter is not a teacher and is precluded by his professional code from originating information. He would be employed by the School District (either as a regular School District employee or as an independent contractor), not by Salpointe. His function is mechanical,[10] and the messages he communicates, while

[10] Judge Tang, dissenting below, correctly observed: "I do not understand the majority to say that the First Amendment

partly religious, are by and large the same messages that he would communicate in any secular school. But if, as the court below contends, aid to children which takes place in a religious school setting is invalid because of that fact, then the textbook loan program in *Allen* was invalid. There the books were utilized in religious school classrooms, were permitted to be stored on the premises of those schools (*Allen, supra,* at 244, n. 6.), and advanced the education there taking place. The Supreme Court pointed out that "books . . . are critical to the teaching process, and in a sectarian school that process is used to teach religion." *Allen, supra,* at 245. The Court in *Allen* did not find that a disqualifying factor. Instead it focused on the public purpose the program served – help to the education of children. *Id.* at 247-248.

Meek, also cited by the court below, is inapplicable to the present case. There the Supreme Court considered a Pennsylvania program which called for the loan of "secular, neutral, nonideological" instructional materials and equipment directly to nonpublic (including religious) schools for use in their classrooms. (*Meek, supra,* at 362-363). While this program seemed "constitutionally indistinguishable" from the program upheld in *Allen* (see *Meek* at 388, opinion of Rehnquist, J., dissenting respecting the loan program), the Court held it invalid. This holding was not, as asserted by respondent (Br. Opp. 10),

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would be offended by the state's provision of a hearing aid or eyeglasses to a parochial school student. Yet these products, like an interpreter, make it possible for a physically impaired student to receive and decipher religious messages." (A-26).

on the ground that the instructional materials and equipment "could be put to religious use."[11] The single ground was the size of the program of institutional loans. Affirming its prior decisions holding "incidental benefits" to religious schools to be constitutional (*id.* at 364), the Court said that the Pennsylvania loan program had a primary effect advancing religion because the aid it constituted was "massive" (beginning for example, with a cost of $12 million for 1972-1973 and increasing to $17,560,000. for 1973-1974). *Id.* at 365. This Court characterized the magnitude of the aid program in *Meek* as "providing a direct and substantial advancement of the sectarian enterprise." *Wolman, supra,* at 250.

The present case, then, is readily distinguishable from the foregoing program considered in *Meek*. No property, under the EHA program if here applied, would pass into the possession of a religious institution. The providing of the service of the interpreter to James would scarcely be comparable to the massive aid program held unconstitutional in *Meek*. While this Court considered that program to amount to state subsidy of a parochial school system "as a whole" (see *Wolman, supra,* at 250), the aid sought by petitioners has been assistance targeted to a disabled individual. Even if it were to be argued that the aid to James would constitute a precedent for aid to other deaf children or even to other disabled individuals

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[11] The Court carefully stated: "To be sure, the material and equipment that are the subject of the loan – maps, charts, and laboratory equipment, for example – are 'self-polic[ing], in that starting as secular, nonideological and neutral, they will not change in use.' " *Meek, supra,* at 365.

similarly situated, the constitutional nature of the aid – help to an individual as contrasted with direct support of a religious enterprise would be the same.

Wolman, supra, also relied upon by the Court of Appeals, likewise constitutes no authority for invalidating the services which were sought by petitioners. The Court, in *Wolman,* held that speech and hearing diagnostic services could constitutionally be provided children by public employees on religious school premises. The Court carefully distinguished such services from the services of teaching or counseling. The Court noted that diagnostic services have little educational content, are not closely associated with the mission of the religious school, and do not provide opportunity for the transmission of sectarian views. *Wolman,* at 244. The Court based its distinction on "the nature of the relationship" which is found in, on the one hand, teaching and counseling, and, on the other, a service which does not involve the influence, or role model, of one who teaches and counsels a child. *Id.* at 244. The certified sign language interpreter, selected and employed by the public authority to perform a mechanical function, severely bound by his professional Code of Ethics, and functioning *between* a teacher and a student, is in no wise comparable to a religious school teacher.[12]

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[12] The Fourth Circuit's decision in *Goodall by Goodall v. Stafford County School Board,* 930 F.2d 363 (4th Cir. 1991), *cert. denied,* __ U.S. ___, 112 S.Ct. 188 (1991), cited by the court below, turned on a construction of Virginia statutes implementing EHA, a placement provision of EHA, and on the court's reliance on the Virginia Constitution and the Establishment Clause. The Virginia law and the EHA placement provisions

D. Furnishing the Requested Service Would not Create Excessive Entanglements Between Government and Religion, Or Any Entanglements Whatever

While the District Court held that furnishing the interpreter to James would create an "entanglement of church and State [that] is not allowed" (citing, with no discussion, *Aguilar, Grand Rapids,* and *Meek*) (A-35), the Court of Appeals found it not "necessary to discuss the third part of the *Lemon* test." (A-13, n. 5). It went on, however, to say, first, that, if the School District were to furnish James a sign language interpreter, it "would be required to monitor closely the interpreter's activities to ensure that assistance was not provided at prohibited times." *Ibid.* Secondly, the court said that since "religious instruction at Salpointe is not limited to specific classes, but pervades the entire curriculum, this monitoring would be the kind of 'comprehensive, discriminating and continuing surveillance' . . . the Establishment Clause condemns." Thus it would be essential "to ensure that 'teachers play a strictly nonideological role'." *Ibid.*

The court left its first point in an ambiguous state since it did not explain what it meant by "prohibited

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upon which the court ruled are not relevant here. For the reasons petitioners have set forth above, the Fourth Circuit erred in its Establishment Clause analysis. The further reliance of that court on 34 C.F.R. § 76.532, barring use of federal educational funds to pay for religous worship, instruction or proselytization, was not cited by the court below. The court was correct in its avoidance of that ground (see Petition for Certiorari, 8, n. 8) as also had been the respondent School District, which raised it for the first time only in its Brief In Opposition. (Br. Opp. 13).

times." As a public employee, the interpreter might reasonably be forbidden to serve in overtime hours. But so could a public school employee. Assuring that would certainly not involve religious monitoring. Thus no "excessive entanglement," as the Supreme Court has defined that term, would be involved here.

As to the court's second point, while the court was incorrect in speaking of the interpreter as a "teacher," the court was correct in saying that religion pervades the Salpointe curriculum. That the interpreter conveys religious messages is a given in the case. Hence warnings derived from *Lemon*, over "prophylactic contacts" needed to keep teachers from inculcating beliefs (see *Lemon, supra*, at 619) are inapposite. Just as no teacher is involved here, nor any inculcation of beliefs by him or her, so too there is nothing here to monitor. Other incidents of the relationship between the School District and the interpreter, such as salary and job performance issues, are essentially those encountered in the usual relationship between public employers and public employees and do not involve any entanglement.

E. Denial of the Requested Service Would Have a Primary Effect Inhibiting Religion

The respondent School District, having determined James to qualify, under EHA, as a handicapped person requiring the service of a certified sign language interpreter in order to receive education, has taken the position that James was entitled to receive the service on the premises of any public school or any secular private school. (J.A. 34, 35, 37; A-4 – A-5). The School District

disqualified him for reception of the service solely on the ground that by furnishing him the service on his religious school premises the School District would have violated the Establishment Clause. The Court of Appeals took precisely that position. Under the teaching of *School District of Abington Township v. Schempp*, 374 U.S. 203, 222 (1963) (carried forward in *Lemon, supra*), governmental action, to withstand the strictures of the Establishment Clause must have "a primary effect that neither advances nor inhibits religion." The School District's denial of the requested interpreter service to James (which service, as seen, would have had no primary effect advancing religion) explicitly conditioned his receiving the EHA benefit solely upon the forsaking of his being educated in the religious school of his parents' conscientious choice. The only visible effect of the School District's denial of that benefit was the creating of a plain and powerful inducement to them to do so. It is correct, therefore, to conclude that the primary effect of the School District's action, however proper the School District deemed it to be, was to inhibit petitioners' religion.

Petitioners recognize that the Court has not taken occasion to state whether, by the "primary effect inhibiting religion" test, it has intended simply to paraphrase the Free Exercise Clause. If not, then by analogy to the Court's holdings on "primary effect advancing religion," the finding of a primary inhibiting effect would of itself invalidate the challenged governmental action. Under either reading, the School District's action in denying James the requested EHA service, would be found to violate the Establishment Clause. If the test of inhibition is deemed a Free Exercise test, or a test related to

"hybrid" rights – religion plus parental rights or religion plus disability rights (see *Employment Division v. Smith*, 494 U.S. 872, 881-882 (1990)) – the injury caused to petitioners by denying James the requested EHA aid could not be found justified by a compelling state interest.[13]

The logical relationship between Establishment and Free Exercise concerns was carefully delineated by this Court almost a half-century ago. In *Everson v. Board of Education*, 330 U.S. 1 (1947) plaintiffs urged that a New Jersey statute providing public support of transportation to religious school pupils violated the Establishment Clause. Stressing government's power "to legislate for the public welfare" in order "to meet problems previously left for individual solution" (*id.* at 6-7), the Court inquired whether the Establishment Clause bars *general* public welfare legislation (in the form of support for the busing of all children) where its particular application would be supportive of religious as well as secular education. *Id.* at 3. Noting the pervasively religious character of the Catholic schools to which transportation under the act would be afforded (*ibid.*), the Court said that New Jersey could not "consistently with the 'establishment of religion' clause . . . contribute tax-raised funds to the

[13] The Court of Appeals acknowledged that the denial of the aid to James "does impose a burden on their free exercise rights" (A-14), but sought to justify the burden by stating that the School District had a compelling state interest in ensuring that the Establishment Clause was not violated. *Ibid.* The proposition that one First Amendment clause somehow overrides another, is unfounded in any Supreme Court decision. The contrary is suggested in *Widmar v. Vincent*, 454 U.S. 263, 275-276 (1981) and see *Doe v. Small*, 964 F.2d 611, 618-619 (7th Cir. 1992).

support of an institution which teaches the tenets and faith of any church." *Id.* at 16. But the Court then pointed to the limitation which the Free Exercise Clause places upon an absolutist, or secularist, reading of the Establishment Clause:

> On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation.

Id. at 16. (Emphasis by the Court)

The foregoing teaching of *Everson* plainly applies to the present case. EHA is a generally available public welfare program for the support of all handicapped children. It is sought to be applied here, as the bus program in *Everson* was sought to be applied, *i.e.*, to benefit a child enrolled in a pervasively religious school where the general branches of learning are taught. To attempt to distinguish *Everson* on the ground that the service in Everson did not take place within a religious classroom would be to split hairs. In each case, the public service is to enable a child to get both a religious and a secular education. To exclude petitioners in the present case from participation in the benefits of EHA, "because of their faith" (*i.e.*, their religiously based choice of Salpointe), would undeniably inhibit them in the exercise of their religion.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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